NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FERNANDO RUIZ MARTINEZ, Petitioner - Appellant, v. ROY A. CASTRO, Warden, Respondent - Appellee.	No. 02-16373 D.C. No. CV-98-06159-OWW MEMORANDUM[*]

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted August 13, 2003
San Francisco, California

Before: REINHARDT and GRABER, Circuit Judges, and SHADUR,[**] Senior District Judge.

Petitioner Fernando Ruiz Martinez was convicted in state court of two counts of first-degree murder. After exhausting his state remedies, Petitioner filed

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[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

a petition for writ of habeas corpus under 28 U.S.C. § 2254. The district court denied the petition, and we affirm.

The state trial court improperly instructed the jury with respect to Petitioner's "imperfect self-defense" claim. See People v. Christian S. (In re Christian S.), 872 P.2d 574, 583 (Cal. 1994) (holding that a defendant may argue imperfect self-defense when he had an actual, but unreasonable, belief that he was in danger of death or great bodily injury). However, on direct review, the state court of appeals held that the instructional error was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. 18, 24 (1967) (stating the standard for determining whether a conviction must be set aside because of federal constitutional error), overruled in part by Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (limiting Chapman to direct review and holding that, in the habeas context, an error is harmless unless it is shown to have had a "substantial and injurious effect" on the jury's verdict (internal quotation marks omitted)).

The physical evidence and a witness' testimony demonstrate that Petitioner shot the victims from outside the car in which they were seated as they were apparently preparing to leave the scene. Petitioner testified that he shot the victims while they were walking away from him toward the car. Either way they plainly were not a threat to Petitioner at the time he shot them. Aside from

Petitioner's own testimony, there is no evidence that Petitioner had an actual (if unreasonable) belief that he was in danger, and significant physical and testimonial evidence contradicts his version of events. Thus, the state appellate court's decision that the instructional error was harmless was not contrary to, or an unreasonable application of, clearly established law as determined by the Supreme Court of the United States. See 28 U.S.C. § 2254(d); Wiggins v. Smith, 123 S. Ct. 2527, 2534 (2003) (stating standard). Further, the court's decision was not based on an unreasonable determination of the facts in the light of the evidence presented at the state-court proceeding. See 28 U.S.C. § 2254(d); Wiggins, 123 S. Ct. at 2534 (stating standard). Accordingly, the district court properly denied the petition for writ of habeas corpus.

AFFIRMED.